

1 HONORABLE JAMES L. ROBART
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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MICROSOFT CORPORATION,

11 Plaintiff,

12 v.

13 MOTOROLA, INC., et al.,

14 Defendants.

15 MOTOROLA MOBILITY, INC., et al.,

16 Plaintiffs,

17 v.

18 MICROSOFT CORPORATION,

19 Defendant.

20 No. C10-1823-JLR

21 MICROSOFT'S 10/15/12 MOTION TO
22 FILE DOCUMENTS UNDER SEAL

23 **NOTED FOR:**
24 **Friday, October 26, 2012**

25 **I. RELIEF REQUESTED**

26 Pursuant to Local Civil Rule 5(g) and paragraphs 2(a) and 8 of the protective order
27 entered in this case, Microsoft respectfully seeks leave to file under seal the following
28 documents:

29 (1) Exhibits 2, 3, 6, 7, 9-11 to the Declaration of Christopher Wion in Support of
30 Microsoft's Opposition to Defendants' Motions *in Limine* (the "10/15/12 Wion
31 Declaration"); and
32
(2) Microsoft's Opposition to Defendants' Motions *in Limine*.

33 MICROSOFT'S 10/15/12 MOTION TO FILE
34 DOCUMENTS UNDER SEAL - 1

35 **No. C10-1823**

36 LAW OFFICES
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1 Microsoft seeks to file the foregoing materials under seal because they contain
 2 information that has been identified by Microsoft, Motorola, and/or third parties as confidential
 3 business information under the terms of the protective order issued in this case. In addition,
 4 with the exception of two exhibits (Exhibits 7 and 11), all of the referenced exhibits to the
 5 10/15/12 Wion Declaration already have been sealed pursuant to prior Court orders.

6 For these reasons, and as more fully described below, good cause exists for protecting
 7 the confidentiality of these documents. Microsoft respectfully requests permission to file the
 8 above-referenced documents under seal and that the Court direct such documents to remain
 9 under seal. Microsoft is filing a redacted version of its Opposition to Defendants' Motions *in*
 10 *Limine* as part of the public record.

11 II. FACTS & AUTHORITY

12 A. **The Operative Protective Order and Applicable Court Rules Permit Microsoft to** **File Confidential Information under Seal.**

13 Pursuant to the Protective Order issued by the Court on July 21, 2011, as amended by
 14 Order dated October 3, 2012, Microsoft is permitted to file materials designated by either party
 15 as Confidential Business Information¹ under seal, with such documents to remain under seal
 16 upon Court approval. Paragraphs 2(a) and 8 of the Protective Order govern the filing of
 17 documents under seal. Paragraph 2(a) provides:

18 Any information submitted in pre-trial discovery or in a pleading, motion, or
 19 response to a motion in this action, either voluntarily or pursuant to order, and
 20 which is asserted by a supplier to contain or constitute Confidential Business
 21 Information shall be so designated by such supplier in writing...and shall be
 22 segregated from other information being submitted. Documents shall be clearly
 23 and prominently marked on their face with the legend: "[SUPPLIER'S NAME]
 24 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO

25 ¹ "Confidential Business Information" is defined in the parties' Protective Order as "information which has not
 26 been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or
 27 apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories,
 28 amounts or source of any income, profits, losses, or expenditures." Protective Order Regarding the Disclosure
 29 and Use of Discovery Materials (ECF No. 72), ¶1 (amended by Order dated October 3, 2012 (ECF No. 447)).

1 PROTECTIVE ORDER" or a comparable notice. During the pre-trial phase of
 2 this action, such information, whether submitted in writing or in oral testimony,
 3 shall be disclosed only *in camera* before the Court and shall be filed only under
 seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District
 Court for the Western District of Washington.

4 Paragraph 8 likewise provides that:

5 Any Confidential Business Information submitted to the Court in connection
 6 with a motion or other proceeding within the purview of this action shall be
 submitted under seal pursuant to paragraph 2 above.

7 *Id.*, at ¶ 8.

8 The Federal Rules of Civil Procedure recognize that courts may permit parties to file
 9 "trade secrets or other confidential research, development, or commercial information" under
 10 seal. Rule 26(c)(1)(G) and (H). District courts "are in the best position to weigh the fairly
 11 competing needs and interests of the parties affected by discovery," in crafting the appropriate
 12 treatment of documents for which protected treatment is requested. *Seattle Times Co. v.*
 13 *Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*,
 14 307 F.3d 1206, 1211-1212 (9th Cir. 2002).

15 Additionally, pursuant to Local Rule CR 5(g)(2), the Court may seal a document filed in
 16 support of a non-dispositive motion upon a showing of good cause. Where the material sought to
 17 be sealed "includes information about proprietary business operations, a company's business
 18 model or agreements with clients, there are compelling reasons to seal the material because
 19 possible infringement of trade secrets outweighs the general public interest in understanding
 20 the judicial process." *Selling Source, LLC v. Red River Ventures, LLC*, 2011 U.S. Dist. LEXIS
 21 49664, 18 (D. Nev. Apr. 29, 2011).

22 Further, while the public generally enjoys a right to inspect and copy public records, "it
 23 is uncontested ... that the right to inspect and copy judicial records is not absolute. Every court
 24 has supervisory power over its own records and files, and access has been denied where court
 25 files might have become a vehicle for improper purposes." *Nixon v. Warner Communications*,

1 *Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306 (1978). As the Court recognized, one such “improper
 2 purpose” is where the commercial business information at issue is sought to be used as a
 3 “source[] of business information that might harm a litigant’s competitive standing.” *Id.*
 4 (denying access to copies of tapes played at trial and noting that courts refused public access to
 5 their files where granting such access might “become a vehicle for improper purposes,”
 6 including causing a litigant competitive harm). Good cause exists to grant Microsoft’s motion
 7 to seal.

8 **B. Good Cause Exists for Microsoft to File the Referenced Documents under Seal.**

9 1. Exhibits to 10/15/12 Wion Declaration.

10 a. Exhibits 2, 3, 6, 9 and 10 Previously Have Been Sealed Pursuant to this
 11 Court’s Orders.

12 Exhibit 2 previously was sealed pursuant to this Court’s Order dated 6/6/12 (ECF No.
 13 336). Exhibit 3 was sealed pursuant to an Order dated 9/10/12 (ECF No. 420). Exhibit 6 was
 14 sealed pursuant to an Order dated 9/13/12 (ECF No. 433). Exhibits 9 and 10 were sealed
 15 pursuant to an Order dated 9/10/12 (ECF No. 419).

16 In accordance with the Court’s prior Orders, Microsoft is filing each of the foregoing
 17 Exhibits under seal.

18 b. Exhibit 7 – David W. Curtis Deposition Transcript

19 Exhibit 7 is a copy of the transcript from the July 12, 2012 deposition of Motorola
 20 employee David Curtis. Mr. Curtis testified extensively regarding Motorola’s confidential
 21 licensing practices and Motorola has designated the transcript as “Highly Confidential –
 22 Attorneys’ Eyes Only” under the terms of the Protective Order.

23 c. Exhibit 11 – Expert Report of Michael Dansky

24 Exhibit 11 is a copy of the July 24, 2012 Opening Expert Report of Motorola’s expert,
 25 Michael J. Dansky, submitted in this matter. Motorola has designated Mr. Dansky’s opening

1 report as "Highly Confidential – Attorneys' Eyes Only" under the terms of the Protective
2 Order. Mr. Dansky's report includes extensive references to confidential and non-public
3 financial and business information relating to both Microsoft and Motorola, and should be
4 maintained under seal. Disclosure of this information to third parties or others not covered by
5 the protective order would have the potential to lead to competitive harm.

2. Microsoft’s Opposition to Defendants’ Motions *in Limine* Includes References to Confidential Information Contained in the Above-Referenced Exhibits, and Should Be Redacted

8 Microsoft’s Opposition to Defendants’ Motions *in Limine* includes references to and
9 descriptions of the confidential information contained in the above-referenced exhibits to the
10 10/15/12 Wion Declaration, many of which have previously been sealed pursuant to orders of
11 this Court. To the extent that the Court determines that those exhibits should remain filed
12 under seal, Microsoft’s Opposition to Defendants’ Motions *in Limine* should be filed publicly
13 only in redacted form to avoid disclosure of the confidential information contained in those
14 exhibits. Microsoft is seeking to file under seal only those limited portions of its Opposition to
15 Defendants’ Motions *in Limine* that contain information that should be protected from public
16 disclosure under the governing standards outlined above. While a complete and unredacted
17 version of Microsoft’s Opposition to Defendants’ Motions *in Limine* is being filed under seal,
18 Microsoft is filing a redacted version as part of the public record.

III. CONCLUSION

20 Microsoft has filed the above-referenced documents under seal in compliance with the
21 terms of the Protective Order, the Court's prior Orders referenced above in Section II.B.1.a and
22 the applicable Court rules. Nothing herein is intended as a waiver of Microsoft's right to
23 contest Motorola's designation of material as Confidential Business Information in accordance
24 with the terms of the Protective Order. Microsoft expressly reserves the right to do so as the
25 circumstances warrant.

1 A [Proposed] Order Granting Microsoft's 10/15/12 Motion to File Documents Under
2 Seal has been submitted herewith.

3 DATED this 15th day of October, 2012.

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CERTIFICATE OF SERVICE

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 15th day of October, 2012, I caused the preceding document to be served
counsel of record in the following manner:

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10 DATED this 15th day of October, 2012.
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7 s/ Linda Bledsoe
8 LINDA BLEDSOE
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